

## **FAIR LABOR STANDARDS ACT**

The Fair Labor Standards Act of 1938 is the federal law that establishes minimum wage, overtime pay, record keeping, and child labor standards.<sup>1</sup> This law affects full-time and part-time workers in the private sector and in federal, state and local governments.

The provisions of the FLSA apply to all covered employees regardless of their citizenship or work eligibility. Courts have determined that documented and undocumented immigrants are entitled to the protections of the FLSA.<sup>2</sup>

### **EMPLOYERS SUBJECTED TO THE FLSA**

The federal government as well as most state and local governments must comply with the FLSA. Also most private employers must comply with the FLSA's provisions. Employees of private employers are protected by the FLSA if their employer meets the so-called "enterprise" standard of coverage or they, as individuals, meet the "individual" standard of coverage.

The Enterprise Standard: A private employer, whether local or national in scope, falls within the enterprise standard if two requirements are met. First, the employer must have workers engaged in interstate commerce; producing goods for interstate commerce; or handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Second, the employer's annual gross volume of sales made or business done must equal or exceed \$500,000.

Given the broad definition of interstate commerce, most employers that meet the dollar volume of business test are considered covered enterprises. For instance a local restaurant in Washington, D.C. constitutes a covered enterprise because the restaurant owner buys seafood, meat, and produce that move in interstate commerce and these goods are used and handled by the employees at the restaurant. Similarly, a company that clears land and prepares it for construction constitutes a covered enterprise because the employees, in readying the land for building, handle goods and materials that have moved in interstate commerce.

A number of employers are covered by the FLSA even if they do not meet the dollar volume of business test. These employers include: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

Individual Employee Coverage: If an employer does not meet the \$500,000 volume of business test so as to have all of its employees covered by the FLSA, individual employees of a company still may be covered if (1) the employees are engaged in interstate commerce; (2) the employees are directly engaged in the production of goods

for interstate commerce; or, (3) if the employees are in any closely-related process or occupation directly essential to such production.

“Individual” employee coverage is based on the nature of the particular employee’s work activities. Examples of employees who fall within the individual employee coverage of the FLSA include grocery store employees who stock shelves, clean produce and receive sundries that have moved in interstate commerce and truck drivers or delivery people that transport goods and products across state lines.

Domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters are covered by the FLSA if their cash wages from one employer are at least \$1,500 in a calendar year or they work a total of more than eight hours a week for one or more employers.

## **THE MINIMUM WAGE**

Workers covered by the FLSA are entitled to the minimum wage of \$7.25 an hour as of July 24, 2009. The FLSA minimum wage rate applies to all fifty states and most U.S. territories and possessions.

Many states have adopted their own minimum wage rates, and eleven states have higher rates than the federal rate.<sup>3</sup> For example, in California covered employees are entitled to the minimum wage of \$8.00 an hour, and in Connecticut covered employees receive \$8.00 an hour. Employees in these states are paid the higher state wage because the FLSA does not preempt state laws that provide for more favorable minimum wage and overtime standards. Some states have adopted the federal rate. Other states have no minimum rate or set rates lower than the federal rate; in these states, covered employees are entitled to the federal minimum wage rate.

### **Definition of Working Time**

In order to determine if employers are complying with the FLSA, it is important to know what constitutes work. Generally, employees are compensated for time that they spend on principle activities-- duties and tasks that are an integral part of their job. Listed below are activities that employees commonly perform at work along with an explanation as to whether these activities require compensation.

Waiting Time: If idle time is spent predominantly for the benefit of the employer, the employee is entitled to compensation. For the most part, waiting time while on-duty is compensable time. For instance, assembly line workers at a frozen food packaging plant engaged in compensable time when they experienced idle time of 45 minutes or less due to delays in delivery and mechanical failures. Migrant farm workers who spent time waiting in the fields for the dew to dry on tomatoes before picking them engaged in compensable time.

Rest Periods: Neither the FLSA nor any other federal law requires employers to grant rest periods. If an employer chooses to grant rest periods or coffee breaks to employees, those periods of a short duration (5-20 minutes) are considered hours worked.

Meal Periods: Nothing in the FLSA mandates that employers provide meal periods to their employees. However, meal periods are customary at most workplaces. Lunch or meal periods do not have to be considered work time if they last at least 30 minutes, and if the employees are completely relieved from active and inactive duty.

Pre-shift and Post-shift Work: Incidental activities that are preliminary to or that follow employees' principal duties are not counted as work time. However, activities performed by employees before or after the regular work shifts that are integral and indispensable to their principal activities are compensable. For instance, the time restaurant employees spend setting up the dining room is compensable.

Training and Meetings: The time employees spend attending employer-sponsored lectures, meetings and training programs is compensable. Thus, for example, when an employer provides training to employees on how to work with hazardous chemicals in the workplace, the training time is considered work time.

Travel Time: In general, employees are not entitled to compensation for travel time that is not a principal activity. For instance, the time employees spend traveling from home-to-work and from work-to-home is not compensable work time.

Travel time from a central location to an outlying work site before the start of work also is not compensable. For instance, seasonal farmer workers were not entitled to compensation for the hours of time they spent on a labor contractor's bus traveling between the job site and their homes. However, travel from a central location to an outlying work site is compensable if duties are performed at the central location before the travel.

Medical Attention: The time spent by employees waiting and receiving medical attention on an employer's premises or at the direction of an employer during normal workdays constitutes compensable time. If an employee visits a personal physician or a company doctor outside of work hours, the time spent obtaining medical care need not be treated as compensable.

### **Payment of Minimum Wage**

The FLSA requires that employers pay wages in cash or an equivalent negotiable instrument. Tokens or coupons are not considered proper forms of payment under the FLSA. However, employers can use these devices to measure the wages that their employees earned. For example, a farm labor contractor can give a token to each of the field workers for each basket of peppers they pick and then count each worker's tokens at the end of the day to compute their pay.

In general, wages must be paid to the employee in a timely fashion, on his or her regular payday. It is unlawful for employers to retain any part of the minimum wage past the end of the pay period. Thus, farm owners cannot withhold money from their workers' weekly pay (which would reduce the workers' pay below minimum wage), and then give the withheld amounts as bonuses when the migrant workers leave the owners' employ.

### **Determining Whether Employers Complied with the Minimum Wage Requirements**

To determine whether an employer has complied with the minimum wage requirements, a worker must divide the actual compensation received for a week by the number of hours he or she worked in that same period.

Not all employees are paid on an hourly basis. Many receive a salary, a commission, or are paid on a piece-rate basis. Regardless of how workers are paid, they still must receive at least the equivalent of the required minimum hourly wage. Thus, for example, a garment worker in California who is paid 50 cents for every sleeve or 70 cents for every pant leg she sews must earn at least \$8.00 an hour.

Tips: Employers of tipped employees (i.e., employees engaged in occupations in which they customarily and regularly receive more than \$30 a month in tips) may consider the tips of these employees as part of their wages. However, pursuant to the FLSA, the employer must tell their employee that it intends to treat tips as satisfying part of their minimum wage obligation. In addition, employers must pay at least \$2.13 per hour in direct wages. In the event that an employee's tips combined with the employer's direct wages of at least \$2.13 an hour do not equal the minimum hourly wage, the employer must make up the difference.

### **Allowable and Disallowable Deductions from Employees' Wages**

The FLSA allows an employer to deduct from an employee's wages the "reasonable cost" of "board, lodging, or other facilities that are customarily furnished by employers to their employees." Employers can take these deductions even if they result in the employees' pay falling below the minimum wage rate. However, "reasonable cost" may not exceed employers' actual cost.

Meals: The reasonable costs of meals regularly furnished to employees may be deducted from employees' wages. Employers may take a credit for employer-provided meals regardless of whether the employees accept the meals.

Housing: The cost of housing may be deducted from employees' wages where the housing is "customarily furnished" and provided for the benefit of the employee. However, facilities are not "customarily furnished" when they are furnished in violation of federal, state, or local law.

Facilities: Merchandise available at company stores and commissaries are considered “facilities” within the meaning of the FLSA. Therefore, for example, a grower can deduct from farmworkers’ wages for food and clothing that workers buy from the store as long as the merchandise furnished primarily benefits the employees.

Disallowable Deductions from Employees’ Wages: The FLSA prohibits employers from deducting employer-required uniforms, and tools of the trade, if they reduce employees’ wages below the minimum rate required by the FLSA or reduce the amount of overtime pay due under the FLSA.

## **OVERTIME**

The FLSA does not limit the number of hours in a day or days in a week employees (who are 16 years or older) may be required or scheduled to work. Thus, for example, a worker at a dry cleaner can work 10 hours a day, six days a week. However, the FLSA provides that covered employees, unless exempt, receive overtime pay after 40 hours of work in a “workweek.” The law stipulates that the overtime pay rate must equal at least one and one-half times the employee’s regular rate of pay.

To determine overtime hours, employers must total the hours that their employees worked in the workweek. If their employees worked more than 40 hours, the employees are entitled to overtime pay for the hours in excess of 40. The FLSA does not permit employers to average hours over two or more weeks. Thus, a landscaper who works 30 hours in one week and 50 hours in a second week is entitled to 10 hours of overtime pay because the employee worked over 40 hours during the second week.

## **EXEMPTIONS FROM FLSA**

Certain categories of employees are exempt from the minimum wage and overtime pay provisions and from the child labor provisions of the FLSA.

Some of the commonly used exemptions from both the minimum wage and overtime pay provisions of the FLSA include: white-collar employees, outside sales employees, certain computer professionals, amusement and recreational employees, employees of small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, farm workers employed on small farms, and casual baby sitters and companions.

Some of the commonly used exemptions from only the overtime provision of the FLSA include: certain commissioned sales employees of retail or service establishments; salesmen, partsmen, and mechanics employed by automobile dealers; certain agricultural workers; domestic service workers living in the employer’s home; employees of railroads and air carriers; taxi drivers; and certain employees of motor carriers.

## **CHILD LABOR LAWS**

The FLSA child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well being. The provisions include restrictions on hours of work for minors under age 16 and lists occupations that youths cannot perform because they are deemed too dangerous.

Minimum age standards depend on whether the child performs a non-agricultural job or agricultural job. The FLSA permits children working in agricultural jobs to labor at younger ages and at more hazardous tasks than children working in non-agricultural jobs.

For instance, the permissible jobs and hours of work, by age, in agricultural work include: youths 16 years and older may perform farm work, whether hazardous or not, for an unlimited number of hours; youths 14 and 15 years old may perform any nonhazardous farm job outside of school hours; youths 12 and 13 years old may work outside of school hours in nonhazardous jobs, either with a parent's written consent or on the same farms as the parent(s); youths 12 years old may perform jobs on farms owned or operated by parent(s), or in nonhazardous jobs on farms not covered by minimum wage requirements with a parent's written consent, outside of school hours.

In contrast, the permissible jobs and hours of work, by age, in non-agricultural work include: youths 18 years or older may perform any job for unlimited hours; youths age 16 and 17 may perform any job not declared hazardous by the Secretary of Labor for unlimited hours; youths age 14 and 15 may work outside school hours in various non-manufacturing, non-mining, nonhazardous jobs under certain conditions.

## **RECORDKEEPING REQUIREMENT**

Employers are required by the FLSA to maintain accurate records of time worked by their employees. The records do not have to be kept in any particular form and time clocks need not be used. The records that employers must maintain for each employee who is covered by the FLSA's include: personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age; hour and day when workweek begins; total hours worked each workday and each workweek; total daily or weekly straight-time earnings; regular hourly pay rate for any week when overtime is worked; total overtime for the workweek; deductions from or additions to wages; total wages paid each pay period; and, date of payment and pay period covered.

## **WHAT THE FLSA DOES NOT COVER**

There are a number of employment practices that FLSA does not regulate. For example, the FLSA does not require: vacation, holiday, severance or sick pay; extra pay

for weekend or holiday work; pay raises or fringe benefits; and a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees. These benefits remain a matter of agreement between employers and employees. The FLSA also does not provide unemployment insurance benefits or workers' compensation; these programs are administered by states.

## **ENFORCEMENT OF THE FLSA**

The FLSA is enforced by the Wage and Hour Division (WHD) of the United States Department of Labor (DOL). The National Office is located in Washington, D.C. and District Offices are located throughout the country. District Offices are listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division. Also, individuals who have access to the internet can obtain information from the WHD's internet web page.<sup>4</sup>

### **Investigations and Complaints**

DOL enforces the FLSA is by conducting investigations. DOL selects certain businesses or industries for their investigations. Also, investigations occur as a result of complaints filed with WHD's District Offices by employees or unions. All complaints are kept confidential. The name of the complainant and the nature of the complaint are not disclosed.

It is a violation of the FLSA for an employer to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act. DOL can seek the reinstatement with back pay of an individual who has been discharged for attempting to enforce the FLSA.

Once a complaint has been filed, an investigator determines whether the law has been violated. If violations are found, DOL tries to get the employer to voluntarily comply with the law. If DOL is unsuccessful, the department may bring an action in federal court against the employer. An employee also may file a private lawsuit in federal or state court.

*The information contained in this article is for general informational purposes only. It is not intended to serve as legal advice and it does not substitute for legal counsel.*

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<sup>1</sup> 29 U.S.C. §§ 201 et seq.

<sup>2</sup> See *Patel v. Quality Inn South*, 846 F.2d 700, 704-05 (11<sup>th</sup> Cir. 1988) (undocumented aliens are "employees" covered by the FLSA); cert. denied, 489 U.S. 1011 (1989); *In re Reyes*, 814 F.2d 168, 170 (5<sup>th</sup> Cir. 1987), cert. denied, 487 U.S. 1235 (1988) (the protections of the FLSA are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant); see also *Lopez v. Rodriguez*, 668 F.2d 1376, 1378 (D.C. Cir. 1981) (resident alien from Bolivia successfully brought action under FLSA); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 103 F.Supp2d. 1180, 1184-86

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(N.D. Cal. 2000) (undocumented workers, like documented workers, are entitled to file complaints against employers and enjoy the same protections against retaliation when they assert their rights under the FLSA);

<sup>3</sup> A list of minimum wage rates in the states is available at:

<http://www.dol.gov/dol/esa/public/minwage/america.htm>.

<sup>4</sup> The address is: <http://www.dol.gov/esa/whd>.